IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Mahaveer Prasad and another.
vs.
Satya Narayan and others.

S.B.CIVIL SECOND APPEAL NO.67/1992 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 29.1.1992 PASSED BY SHRI KAILASH CHANDRA JAIN, ADDITIONAL DISTRICT JUDGE, NOHAR IN CIVIL APPEAL NO.36/1987.

DATE OF JUDGMENT ::: 6.12.2005

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Ms. Rekha Borana, for the appellants.

Mr. RK Singhal, for the respondents.

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BY THE COURT:

Heard learned counsel for the parties.

It will be worthwhile to mention here a few facts about the case. It appears from the plaint allegations that the plaintiffs/appellants, on the basis of patta in their

favour which was issued in the samwat year 1939, filed a suit for injunction against Pokar Mal, Ami Chand, Shyam Lal, Mangi Lal and Municipal Board, Nohar which was decreed by the trial court on 1.4.1977 restraining the Municipal Board, Nohar from allotting any land out of pattasud land of the plaintiffs. However, despite this decree, according to the plaintiffs, said Pokar Mal, Ami Chand, Shyam Lal and Mangi Lal encroached upon part of the plaintiffs' land and according to the plaintiffs, for this, the Municipal Board, Nohar helped those persons in encroaching upon the plaintiffs' land, therefore, the plaintiffs submitted execution petition against the above mentioned persons. The present defendant Satya Narayan, who was not party in the earlier suit, also encroached upon 300 square yards land of the plaintiffs, therefore, the plaintiffs filed the suit for possession against Satya Narayan because of the fact that Satya Narayan was not party in the earlier suit and there was no decree against him, therefore, the plaintiffs could not have sought any relief against the present defendant Satya Narayan without obtaining decree for possession against the defendant.

It will be further worthwhile to mention here that Pokar Mal, Ami Chand, Shyam Lal and Mangi Lal and Municipal Board are not party in the present suit for which, according to the plaintiff, since legal proceedings could have been initiated by launching execution petition to execute the decree which the plaintiff obtained against those persons, therefore, they were not necessary parties

rather they could not have been impleaded party in the present suit.

The defendant submitted written statement and denied all allegations of the plaintiff and stated that in fact, the plaintiff obtained a collusive decree which is apparently clear from the fact that one of the defendant Ami Chand died two years before the date of decree and one of the defendant Mangi Lal sold his land to Smt. Durga Devi much before filing of the suit by the plaintiff in the year 1974. The defendant also submitted that the plaintiff did not disclose the measurement of his property and the land which the plaintiff is claiming to be in possession of other persons, therefore, there arises no question of the plaintiff being in possession of any part of the land. The defendant also submitted that even the execution petition filed by the plaintiff has already been dismissed by the executing court. The defendant took the plea that the plot in question belongs to his wife Smt. Saraswati Devi as it was gifted to her by her maternal uncle. Smt. Saraswati Devi or her predecessor in title have not been impleaded as party in the present suit, therefore, no decree can be passed.

The trial court framed the issues and the plaintiff produced his witnesses and the defendant produced his witnesses.

The trial court after considering the evidence held

that the plaintiff failed to prove the plot in question as his ownership plot. The trial court also decided that the suit property was in possession of the defendant and his wife since last 50 years. Ultimately, after deciding the issues against the plaintiff, the suit was dismissed by the trial court vide judgment and decree dated 19.9.1987, against which the plaintiff preferred first appeal that too was dismissed on 29.1.1992. Hence, this second appeal.

According to learned counsel for the appellants, the two courts below dismissed the suit of the plaintiff simply because of the fact that the plaintiff did not produce the patta which was issued in the plaintiff's favour in the Samwat Year 1939. It is further submitted that it is not in dispute that the said patta was produced in the earlier suit which was filed against Pokar Mal, Ami Chand, Shyam Lal, Mangi Lal and Municipal Board, Nohar and on the basis of the said patta only, the plaintiff's suit for injunction was decreed by the trial court on 1.4.1977. Copy of judgment was produced by the plaintiff in the present suit. It is also pointed out by the learned counsel for the appellants that photostat copy of the patta was produced in the trial court which is clear from the order-sheet dated 23.1.1986 wherein it is recorded that the plaintiff produced the photostat copy of patta and that too after showing the copy of patta to learned counsel for the defendant. However, learned counsel for the appellants submits that because of any reason, obviously by mistake, the original patta was not produced nor exhibited in the

present suit, therefore, the appellants have submitted an application under Order 41 Rule 27 C.P.C. in second appeal before this Court on 20.4.1992 seeking permission to produce additional evidence.

According to learned counsel for the appellants, the Hon'ble Apex Court in various cases namely, (1) Sarada (Smt.) and others vs. Manikkoth Kombra Rajendran reported in (1996) 8 SCC 345 ; (2) Marwari Kumhar and others vs. Bhagwanpuri Guru Ganeshpuri and another reported in AIR 2000 SC 2629 and (3) Jayaramdas and Sons vs. Mirza Rafatullah Baig and others reported in 2004 AIR SCW 3614 allowed the additional evidence at appellate stage and in view of the reasons given in the said judgments, it is clear that the Court can permit additional evidence at any stage including at second appellate stage.

According to learned counsel for the appellants, the genuineness of the document cannot be questioned as it was produced in the judicial proceedings as back as in the year 1974 and the Court, after relying upon the said patta, decreed the suit of the plaintiff for this very land. It is also submitted that the appellants cannot be deprived from their property in a situation where copy of the patta was already on record in the knowledge of the counsel for the defendants and, therefore, even if there was any negligence on the part of the plaintiff in producing the evidence, that can be condoned and they may be permitted to produce the additional evidence.

According to the learned counsel for the appellants, their case is founded upon the patta whereas the defendant

has come with a totally concocted story which cannot be believed, therefore, in the above facts also, the appellants' patta can be examined by this Court.

I have considered the submissions of the learned counsel for the parties and perused the reasons given by the two courts below.

Since the application filed under Order 41 Rule 27 CPC, if is allowed, it will have material impact on the judgment and decree, therefore, first it is to be considered whether any case is made out for producing additional evidence by the plaintiff. For this, it may be recapitulated that the present suit for possession was filed by the plaintiff on 16.1.1979 and for the reasons best known, the plaintiff did not file the patta which was the basis of the suit till he lost in two courts. Not only this, but the plaintiff, who submitted that he filed the earlier suit on the basis of patta against four persons and Municipal Board, Nohar and obtained the decree, cannot say that he was not knowing the importance of the patta if it is genuine. Not only this but original patta yet has not been submitted by the appellant and only photocopy of the patta has been submitted with the application under Order 41 Rule 27 CPC, therefore, the appellant's application under Order 41 Rule 27 CPC is liable to be dismissed on these grounds only.

It would be further worthwhile to mention here that according to the defendant, the plaintiff obtained

collusive decree by impleading four persons and Municipal Board, Nohar and despite this fact, the plaintiff did not produce the patta to show their title. The defendant also took the plea that the property in dispute was bequeathed by maternal uncle of his wife to his wife and thereby, he set up a title in his wife's favour, still the patta was not produced by the plaintiff. Not only this, when the trial court decided against the plaintiff, he did not submit any application before the first appellate court under Order 41 Rule 27 CPC seeking permission to produce additional evidence. After almost 23 years from the date of filing of the suit, the plaintiff is seeking permission to produce secondary evidence at second appellate stage. These facts clearly show that there was no bonafide reason for not filing the patta in the trial court or before the first appellate court and the judgments, which were relied upon by the learned counsel for the appellants cannot be stressed to mean that in such facts like the present, the appellants can be permitted to produce evidence so as to reopen the entire suit proceedings of the year 1979.

The two courts below rightly held that the plaintiff failed to prove the title to his property and, therefore, he cannot get any decree of possession of the property against the persons who are in settled possession.

In the totality of the facts and circumstances of the case, I do not find that the courts below have committed any error of fact or law in dismissing the suit and appeal

of the plaintiff.

No substantial question of law is involved in this appeal, therefore, this appeal deserves to be dismissed, hence dismissed.

(PRAKASH TATIA), J.

S.Phophaliya